IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VANESSA JEAN PRUITT, ADMINISTRATRIX OF THE ESTATE OF CHARLIE E. PRUITT, DECEASED; VANESSA JEAN PRUITT, MOTHER AND LEGAL GUARDIAN OF ANGEL M. PRUITT, AN INFANT UNDER THE AGE OF 18 YEARS; VANESSA JEAN PRUITT, INDIVIDUALLY; AND TIMOTHY B. PRUITT,

Appellants,

v. **No. 33526**

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY, C.F. KANE, JOHN DOE I, JOHN DOE II, and JOHN DOE III,

Appellees.

BRIEF OF APPELLEE DEPARTMENT OF PUBLIC SAFETY

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BRIEF OF APPELLEE DEPARTMENT OF PUBLIC SAFETY

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

Appellants filed the instant action against Trooper C.F. Kane, in his official and personal capacity, and the West Virginia Department of Public Safety (hereinafter WVDPS)[1] on January 22, 2003. In additions to the allegations raised pursuant to 42 U.S.C. §1983 against Kane, Appellants specifically asserted that Appellee, WVDPS violated their statutory and constitutional rights by failing to properly supervise, train, instruct and control Defendant C. F. Kane. The Appellants further alleged that WVDPS has negligently allowed a pattern and practice of police brutality, excessive police force, and/or constitutional violations to develop and exist as a matter of custom and policy within the WVDPS, resulting in, and proximately causing alleged actions and injuries to

[1] The West Virginia Department of Public Safety's name was officially changed to "The West Virginia State Police" by the legislature during the 1995 legislative session. See W.Va. Code §15-2-2.

the Appellants. *See Plaintiffs' Complaint at Paragraphs 39-45.* Both Kane and the WVDPS filed separate motions for summary judgment. WVDPS argued that the case should be dismissed against WVDPS based on the following:

1. Appellants did not establish any custom or practice of deliberate indifference to the supervision, training, and discipline of Trooper Kane, much less a custom or practice of allowing police brutality, excessive police force, and/or constitutional violations within the Department and,

2. WVDPS is not a "person," Therefore the provisions of 42 U.S.C. § 1983 are not applicable.

Appellants filed a response arguing that the doctrines of judicial and equitable estoppel prevented the WVDPS from asserting avoidance defenses based upon statements made by the prosecuting attorney of McDowell County during grand jury proceedings.

In an Order issued November 29, 2006, the circuit court agreed with the arguments of the WVDPS, specifically finding that the West Virginia Department of Public Safety is not a "person" for the purposes of an §1983 action and that even if the WVDPS was considered a "person" pursuant to that Act, "the plaintiffs have failed to identify an official policy or custom of the West Virginia Department of Public Safety that caused a deprivation of plaintiffs' or plaintiffs' decedent's constitutional rights, nor has there been evidence offered which creates a genuine issue of material fact that the West Virginia Department of Public Safety was deliberately indifferent to any rights of the plaintiffs or plaintiffs' decedent, given the elements outlined in Shaw v. Stroud.[2] Further, given the totality of the deposition testimony, the plaintiffs have failed to establish a genuine issue of material fact such that a reasonable jury could find in her

[2] *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).

favor." As a result the circuit court dismissed all the counts against WVDPS. The circuit court denied Kane's Motion for summary judgment finding that there still existed issues that should go to the jury.

II. STATEMENT OF FACTS

Shortly before 7:00 am on the morning of December 23, 2001, C.F. Kane, an officer assigned to the Welch detachment of the West Virginia State Police, received a call from the McDowell County 911 Center advising him of a domestic situation in Shaft Hollow. The 911 dispatcher relayed to Trooper Kane that a call had been received from a female who had been involved in a physical altercation with her father, and that the female was also claiming that her mother had been assaulted by the father as well.[3] Trooper Kane was told that the caller's four-year-old daughter was still in the house, and that there were multiple weapons in the house, but none of them had been used at the time the female placed the call to 911. See Transcript of Deposition of C.F. Kane, p. 44

While Timothy Pruitt was asleep in his bedroom in the early morning hours of December 23, 2001, he was awakened by the sound of his sister [Tasha] and father [decedent] arguing out in the kitchen. According to Timothy, the decedent was extremely upset with Tasha because she had stolen a check from the decedent's sister. See Transcript of Deposition of Timothy Pruitt, pp. 18-19. At some point the argument between Tasha and the decedent became quite intense and moved out of the home and into the front yard, at which time the decedent physically pushed Tasha to the ground. See Transcript of Deposition of Vanessa Pruitt, pp. 102-103, It was shortly after this

[3] It was later determined that the female caller to 911 was Tasha Pruitt, the daughter of the decedent, and her call was in regards to the actions of the decedent, Charlie Pruitt. She did not place the call from inside the Pruitt residence. The mother referenced in the 911 call was Vanessa Pruitt, plaintiff in the present action, who later remarried and is now known as Vanessa Pruitt Addair.

incident that Trooper Kane received the call from 911 dispatch advising him of the domestic situation at the Pruitt household in Shaft Hollow.

It was still partially dark when Trooper Kane arrived at the Pruitt residence, and he proceeded to park his cruiser and walk up onto the front porch. Kane depo. pp. 46, 138. Contrary to the statement of facts provided by the Appellant, Tasha was not standing outside the Priutt resident when Trooper Kane arrived but was located at her cousins house next door and did not arrive at the Priutt house until after the incident had occurred. See Transcript of Deposition of Tasha Priutt Tillotson, pp. 49-51. After opening the screen door he knocked on the wooden door, which was slightly ajar, and announced "State Police". Id at pp. 50-54; Vanessa Pruitt depo. p. 125. As a result of Trooper Kane's knock, the door partially opened such that he could now see into the living room of the house and observed the decedent seated on the couch with both arms extended and a dark colored handgun in his hands pointed at Trooper Kane. Kane depo. pp. 50-54. Trooper Kane also observed another gun lying on the couch just to the right of the decedent.[4] Id. at 59. Upon observing the decedent pointing a gun at him, Trooper Kane positioned himself behind the wall at the threshold to the front door for protection. Id. at 60. Trooper Kane then stated "State Police, drop the gun." Id. The decedent did not comply.

Due to the location of the front door and windows, any retreat would have placed Trooper Kane in the decedent's line-of-sight, and thus, Trooper Kane was effectively trapped on the front porch. Kane depo. pp. 61, 167, 182,. Trooper Kane then heard

[4] According to Vanessa Pruitt's deposition testimony, she observed the decedent sitting on the couch with three weapons on the couch with him prior to Trooper Kane's arrival at the residence. *See Vanessa Pruitt depo. p. 114.* Tasha Priutt also testified that, while she was walking towards the Priutt residence, she heard Trooper Kane state "Don't touch that gun." twice before the she heard gunshots. *See Tasha Pruitt depo pp. 50-51.*

sounds from the living room that indicated to him that the decedent had gotten off the couch and was up on his feet. Id. at 64. At that point, Trooper Kane peered back around the door facing and saw the decedent standing up with his arms extended, gun pointed at Trooper Kane, and appeared to be moving towards Trooper Kane's location. Id at 64-65. Trooper Kane then stated multiple times "State Police, drop the gun". Id at 66. Again, the decedent did not comply with these verbal commands. Id at 71.

At this point, Trooper Kane believed his life to be in imminent danger and was forced to draw his service weapon and fire at the decedent in order to eliminate the threat to his life and the lives of the other persons still inside the Pruitt residence. Kane depo. p. 67. Trooper Kane fired at the decedent until the decedent was on the floor and no longer presented a threat. Although the incident required one magazine change by Trooper Kane, he clearly stopped firing when he felt the threat was eliminated since seven rounds in his service weapon remained when he ceased shooting. Id at pp. 77-80, 90.

Vanessa Pruitt was awake in her bedroom at the time of the incident, but could not see the front door and could not see the decedent after he stood up from the couch. Vanessa Pruitt depo. pp. 123, 128, 136. She similarly could not see the decedent's hands at the time he stood up from the couch. Id at pp. 138-139. After the shooting had stopped, Vanessa Pruitt immediately came out of the bedroom and into the living room from Trooper Kane's left. Kane depo. pp. 91-92; Vanessa Pruitt depo. p. 140. Timothy Pruitt made his way into the living room right after Vanessa. Vanessa Pruitt depo. p. 143. Timothy was not in a position to observe the decedent until after the shooting ceased. Timothy Pruitt depo. pp. 25, 30-31.

Once Timothy and Vanessa were in the room Trooper Kane ordered them to put their hands up and to stay away from the decedent. Kane depo. p. 98; Timothy Pruitt depo. p. 39. Trooper Kane was unsure what the pair's intentions were at that time and he knew there were guns in the house and could see two guns still lying on the couch. Kane depo. p. 96. Timothy Pruitt was cussing Trooper Kane, saying "fuck you" and calling him a "murderer". Timothy Pruitt depo. pp. 40, 79; Kane d epo. p. 95. Timothy admits to being "pretty heated at the time", and Vanessa described him as being "hysterical". Timothy Pruitt depo. p. 39; Vanessa Pruitt depo. pp. 150, 153. Trooper Kane needed to secure the area not only for his safety, but for the safety of everyone in the household.[5] Kane depo. p. 97.

Timothy Pruitt, being highly aggravated, began to go back towards the kitchen, and Trooper Kane followed in an attempt to detain him. Kane depo. p. 99. Trooper Kane then placed Timothy Pruitt in handcuffs and took both Timothy and Vanessa down to his cruiser so he could call 911. Id at pp. 104-105. In order to ensure everyone's security, the handcuffs remained on Timothy until additional law enforcement officers arrived at the scene.

In their statement of facts, Appellant's attempt to use the autopsy report and testimony of the Medical Examiner to prove that the decedent was not holding a gun at the time he was shot by Trooper Kane. First, Appellants assert that the decedent was clutching a cigarette in his left hand proves that he could not have been holding a gun. The evidence shows that the cigarette was located inside the closed fist of the decedent and not in his fingers. The medical examiner volunteered that the cigarette butt could

[5] Also note that Vanessa Pruitt testified that the "guns was laying right there", and that "[t]he only thing - -if he [Timothy] wanted to get one, the only thing he [Timothy] had to do was reach down and get one." *Vanessa Pruitt depo. p. 154.*

have been grabbed by the decedent after he fell to the floor and that there were no cigarette burns in that palm of his hand. See deposition transcript of Dr. James Kaplan p 68. Photos of the scene show several cigarette butts on the floor around the decedent's body.

Next plaintiffs provide that the medical examiner "stated that he could 'testify to a reasonable degree of medical certainty' that Charles Pruitt 'could not have been holding a gun in his hand at the time the wound to his right hand was received.'" The entire exchange clearly disproves this assertion.

Q. With regard to the gunshot wound to the right hand, is it your testimony that you cannot say or testify to a reasonable degree of medical certainty whether he was or was not holding a gun in his hand?

A. He may have been holding a gun in his hand, but the time that the wound was received, he could not have been holding a gun in his hand.

Q. All right, Of course we don't know whether that was the first shot or the fourteenth shot do we?

A. That's correct

Q. If he were holding the gun in his hand and received gunshot wounds, Is it possible or probable that his palm would have – if he was holding a gun with his fist closed that his palm could have opened up?

A. Yes, it's possible. It's certainly possible.

Q. And the gun could have fallen from his hand at that point?

A. It's possible.

Q. Is it possible that the gun could have simply have rotated – if he had his finger on the trigger through the finger guard, is it possible that the gun could simply have rotated on his trigger finger and he still have the gun in his hand with the palm open?

A. I suppose it's possible.

Q. There is simply no way of knowing?

A. He couldn't have been holding the gun the way guns are normally held and still receive that gunshot wound. He could of kept hold of it like this, or it could have been off a finger or something. I'm just not sure.

Q. And again, there is no way that you can testify to a reasonable degree of medical certainty with regard to the autopsy findings as to whether he was or was not holding a gun in his hand at the time that he was – that Trooper Kane encountered Mr. Pruitt?

A. That's correct.

See Kaplan depo pp 92-93.

The medical examiner later testified that the bullet could have just missed the gun or struck part of the gun before it made the wound to the hand. See Kaplan depo, p97-98. Trooper Kane was the only witness to the firing of the shots and the other witness statements and physical evidence do not contradict, his statements.

Appellants filed the instant action on January 22, 2003 § 1983 asserting that Defendant, West Virginia Department of Public Safety (hereinafter WVDPS) violated their statutory and constitutional rights by failing to properly supervise, train, instruct and control Defendant C. F. Kane. The Appellants further alleged that WVDPS has

negligently allowed a pattern and practice of police brutality, excessive police force, and/or constitutional violations to develop and exist as a matter of custom and policy within the WVDPS, resulting in, and proximately causing alleged actions and injuries to the Appellants. See Plaintiffs' Complaint at Paragraphs 39-45. After a hearing on the Appellee's Motion for Summary Judgment, the circuit court found that the WVDPS is not a "person" pursuant to the provisions of 42 U.S.C. § 1983 and that the Appellants have not established any evidence of a custom or practice of deliberate indifference to the supervision, training, and discipline of Trooper Kane, much less a custom or practice of allowing police brutality, excessive police force, and/or constitutional violations within the Department, and this case was properly dismissed.

III. STANDARD OF REVIEW.

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mueller v. American Electric Power Energy Services*, 214 W.Va. 390, 392-93, 589 S.E.2d 532, 534- 35 (2003); 11A M.J., *Judgments and Decrees*, § 217.1 (Michie 1997). As this Court explained in syllabus point 7 of *Petros v. Kellas*, 146 W.Va. 619, 122 S.E.2d 177 (1961):

The summary judgment procedure provided by Rule 56 of the West Virginia Rules of Civil Procedure does not infringe the constitutional right of a party to a trial by jury; it is not a substitute for a trial or a trial either by a jury or by the court of an issue of fact, but is a determination that, as a matter of law, there is no issue of fact to be tried.

Syl. pt. 3, *Harrison v. Town of Eleanor*, 191 W.Va. 611, 447 S.E.2d 546 (1994).

Specifically, syllabus point 3 of *Aetna Casualty and Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963), holds: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 2, *Stewart v. George*, 216 W.Va. 288, 607 S.E.2d 394 (2004); syl. pt. 1, *Mueller*, *supra*; syl. pt. 2, *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819 (2003); syl. pt. 2, *Conley v. Johnson*, 213 W.Va. 251, 580 S..2d 865 (2003).

Upon appeal, the entry of a summary judgment is reviewed by this Court *de novo*. *Redden v. Comer*, 200 W.Va. 209, 211, 488 S.E.2d 484, 486 (1997); syl. pt. 1, *Koffler v. City of Huntington*, 196 W.Va. 202, 469 S.E.2d 645 (1996); syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Nevertheless, as this Court stated in syllabus point 3 of *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997): "Although our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl., *Hively v. Merrifield*, 212 W.Va. 804, 575 S.E.2d 414 (2002); syl. pt. 3, *Glover v. St. Mary's Hospital*, 209 W.Va. 695, 551 S.E.2d 31 (2001); syl. pt. 2, *State ex rel. Department of Health and Human Resources v. Kaufman*, 203 W.Va. 56, 506 S.E.2d 93 (1998).

IV DISCUSSION OF LAW

A. THE CIRCUIT COURT WAS CORRECT WHEN THEY RULED THAT 42 U.S.C. §1983 IS INAPPLICABLE TO THE WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY BECAUSE IT IS NOT A "PERSON" AS REQUIRED BY THE STATUTE.

The Appellants filed this lawsuit alleging violations of 42 U.S.C. § 1983 by the West Virginia Department of Public Safety. That section reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for the redress.

42 U.S.C. § 1983 [emphasis added].

In *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed. 2d 45, (1989), the Supreme Court held that neither states nor state officials acting in their official capacities are "persons" within the meaning of § 1983. The West Virginia Department of Public Safety is an agency of the State of West Virginia. Thus, the State Police is not a "person" as required by § 1983, and is not amenable to suit under this section.

The Appellants argue that "it is the insurance company, and not the State here, that is being sued up to the maximum limits of its liability insurance coverage. The insurance company is not a named party here, the West Virginia Department of Public Safety and Trooper Kane are the named defendants to this action. There is no dispute that the WVDPS is governmental entity that is considered an "arm of the state" and

Trooper Kane is likewise a "state official acting in his official capacity" as a member of the West Virginia State Police. The Appellants cite *Pittsburgh Elevator Company v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E. 2d 675 (1983) in support of their contention that since the insurance company is the real party in interest, the insurance company can be sued as a "person" pursuant to §1983. The fact that a State agency has insurance coverage does not make the insurance carrier a named party in order to become a "person" under §1983. The *Pittsburgh Elevator* case and the other cases listed by Appellants[6] only deal with state constitutional immunities and do not apply to §1983 actions. *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989) was decided after the *Pittsburgh Elevator* case and continues to be the controlling authority.

Interestingly the Appellants, in their response to Appellee's Motion for Summary Judgment, relied on two cases decided prior to *Will* to support their argument that a state is a "person" that can be sued within the meaning of §1983. The first case is *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978) which held that a municipal corporation or municipality is a person within the meaning of §1983. The Court in *Will* clearly distinguished the *Monell* decision when it held that neither states nor state officials acting in their official capacities are "persons" within the meaning of §1983. Specifically the Court held that:

> *Monell* itself is not to the contrary. True, prior to *Monell*, the Court had reasoned that, if municipalities were not persons, then surely States also were not. *Fitzpatrick v. Bitzer*, 427 U.S. at 452. And *Monell* overruled *Monroe*, undercutting that logic. But it does not follow that, if

[6] *Eggleston v. West Virginia Department of Highways*, 189 W.Va. 230, 429 S.E.2d (1993); *State ex rel. W.Va Dept. of Transportation, Highways Division v. Madden*, 192 W.Va. 497, 453 S.E. 2d 331 (1994); *Parkulo v. W.V. Board of Probation*, 199 W.Va. 163, 483 S.E.2d 507 (1996).

municipalities are persons, then so are States. States are protected by the Eleventh Amendment, while municipalities are not, *Monell*, 436 U.S. at 690, n. 54, and we consequently limited our holding in *Monell* "to local government units which are not considered part of the State for Eleventh Amendment purposes," ibid. Conversely, our holding here does not cast any doubt on *Monell*, and applies only to States or governmental entities that are considered "arms of the State" for Eleventh Amendment purposes. See, e.g., *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).

Petitioner asserts, alternatively, that state officials should be considered "persons" under § 1983, even though acting in their official capacities. In this case, petitioner named as defendant not only the Michigan Department of State Police but also the Director of State Police in his official capacity. [491 U.S. 71]

Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a suit against the State itself. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Monell*, supra, at 690, n. 55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.(fn10)

We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983 [7]

Will at 70-71

The other case cited by the Appellants in their prior brief was *Lugar v. Edmundson Oil Co.* Inc. 457 U.S. 922 (1982). That case was likewise decided prior to the *Will* decision and involved a private corporation and obviously did not overrule the holding in *Will.*

Appellants have now abandoned their previous argument and are trying to spin the *Will* holding to fit their new argument when they included the statement from a

[7] In footnote 10 of their brief, Appellants state that "where the head of the Department should have been named and sued in his official capacity in order to meet the 'person' requirement, then plaintiffs should be given leave to name the head of the Department in his official capacity in order to meet any technical pleading requirements." *Will* is clear and on-point that Department heads would not be considered a "person" under § 1983.

footnote in that case which stated that "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. at 167, n. 14; *Ex parte Young*, 209 U.S. 123, 159-160 (1908)." See *Will* at 71 n 10. Appellants neglected to provide the rest of the footnote which distinguished cases for injunctive relief from a case for monetary relief.[8] The case at hand is a case for monetary relief, not injective relief, and the holding in *Will* controls.

This Court has also acknowledged the holding of *Will* and the prohibition of suits against the states pursuant to §1983 when stated:

> In fact, the United States Supreme Court specifically has held that the federal cause of action for remedying violations pursuant to 42 U.S.C. § 1983 does not lie against the states regardless of whether the claim is pursued in federal or state court. The Supreme Court has said it "cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent." *Will v. Michigan Department of State Police*, 491 U.S. 58, 67, 109 S. Ct. 2304, 2310, 105 L.Ed.2d 45, 56 (1989).

Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995).

Appellants have provided absolutely no controlling legal authority for their contention that the suit against this Appellee is really to be considered a suit against its

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[8] 10. Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State." Kentucky v. Graham, 473 U.S. at 167, n. 14; Ex parte Young, 209 U.S. 123, 159-160 (1908). This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, American Constitutional Law § 3-27, p. 190, n. 3 (2d ed. 1988), and would not have been foreign to the 19th-century Congress that enacted § 1983, see, e.g., In re Ayers, 123 U.S. 443, 506-507 (1887); United States v. Lee, 106 U.S. 196, 219-222 (1882); Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876); Osborn v. Bank of United States, 9 Wheat. 738 (1824). City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973), on which JUSTICE STEVENS relies, see post at 93, n. 8, is not to the contrary. That case involved municipal liability under § 1983, and the fact that nothing in § 1983 suggests its "bifurcated application to municipal corporations depending on the nature of the relief sought against them," 412 U.S. at 513, is not surprising, since, by the time of the enactment of § 1983, municipalities were no longer protected by sovereign immunity. Supra at 67, 68, n. 7.

insurance company in order to sue pursuit to §1983. Appellants far reaching legal argument using state case law decided prior to the *Will* decision cannot and should not overcome the precise on-point holdings of *Will* and its progeny concerning the interpretation of a federal statute.

B. THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE COMMON LAW TORT CLAIMS AGAINST THE APPELLEE, DEPARTMENT OF PUBLIC SAFETY SINCE THE APPELLANTS FAILED TO ESTABLISH THE EXISTENCE OF A GENUINE ISSUE OF A MATERIAL FACT AGAINST THE WVDPS

The Appellants argue that the Circuit Court, in dismissing the state common law claims, provided "no explanation or discussion as to how the statutory "person" requirement of 42 U.S.C. §1983 applies to state constitutional claims or state tort claims" and that there is no basis for the dismissal of those claims.

In this argument, Appellants ignore the finding of the circuit court which stated that even if the WVDPS was considered a "person" pursuant to that Act, "the plaintiffs have failed to identify an official policy or custom of the West Virginia Department of Public Safety that caused a deprivation of plaintiffs' or plaintiffs' decedent's constitutional rights, nor has there been evidence offered which creates a genuine issue of material fact that the West Virginia Department of Public Safety was deliberately indifferent to any rights of the plaintiffs of plaintiffs' decedent, given the elements outlined in Shaw v. Stroud.[9] Further, given the totality of the deposition testimony, the plaintiffs have failed to establish a genuine issue of material fact such that a reasonable jury could find in her favor."

The test for determining the propriety of summary judgment is set forth in Syllabus Point 3 of *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,*

[9] *Shaw v. Stroud,* 13 F.3d 791 (4th Cir. 1994).

133 S.E.2d 770 (W.Va. 163) where the Court held, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." The decision on *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994) marked a significant shift in the attitude of the Court towards summary judgment. This shift in judicial attitude was reflected in the following statement:

> Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if in essence there is no real dispute as to salient facts or if only a question of law is involved...Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation ... To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

451 S.E2d at 758.

Later, the Court refined the expression of its new attitude toward summary judgment in Syllabus Point 3 of *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995), where the Court held:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

The WVDPS made a properly supported motion for summary judgment which was supported by affirmative evidence that there was no genuine issue of material fact. The burden then switched to the Appellants who were unable to overcome the evidence supporting WVDPS' motion. Appellants, as discussed more fully later in this brief, produced absolutely no evidence that would support their claims against the WVDPS and therefore all of the claims, including the § 1983 claims, were properly dismissed by the circuit court.

Contrary to the argument of the Appellants, the circuit court was not attempting to override the holding of *Pittsburgh Elevator* when it dismissed all claims against the Department. This Court, in *Clark v. Dunn*, 465 S.E.2d 374, 195 W.Va. 272 (1995) addressed immunities that are in addition to that granted by Section 35, Article VI of the Constitution which affords a different kind of limited immunity to the State and its law enforcement officer for discretionary acts negligently committed within the scope of his employment and were addressed by the *Pittsburgh Elevator* Case.

In that case, which involved a Division of Natural Resources Officer who was involved in a shooting, the Court provided that:

> It is obvious that an immunity standard for a public official needs to encompass all types of public official liability, not just the range of cases covered by Section 1983 suits. It has been said that Section 1983 essentially creates tort liability. *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Monell v. Department of Social Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Paxton v. Crabtree,* 184 W.Va. 237, 400 S.E.2d 245 (1990). Consequently, *the thrust of any attempt to establish liability against a public official is the violation of some duty attendant to the official's office* and a resulting harm to the plaintiff. This analysis essentially adopts the common law tort concept that liability results from the violation of a duty owed which was a proximate cause of the plaintiff's injury. *See, e.g., Parsley v. General Motors Acceptance Corp.,* 167 W.Va. 866, 280 S.E.2d 703 (1981); *Atkinson v. Harman,* 151 W.Va. 1025, 158 S.E.2d 169 (1967).

The one difference in immunity cases is that the official's act must be shown to have violated clearly established law of which a reasonable person would have known. The concept of a reasonable person is not entirely foreign to common law principles of negligence.

Chase Securities, 424 S.E.2d at 599 (emphasis added; footnotes omitted).

In the syllabus of *Chase Securities,* we concluded that:

A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va.Code, 29-12A-1, *et seq.* [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. To the extent that *State ex rel. Boone National Bank of Madison v. Manns,* 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled.

In the case now before us, the appellees argue that summary judgment was proper because *Chase Securities* requires that claims against public officials be based upon violation of a right clearly established by statute or constitutional requirements. We agree.

Officer Dunn is properly considered a public officer, employed by a State agency not covered by the provisions of W.Va. Code, 29-12A-1, *et seq.,* the West Virginia Governmental Tort Claims and Insurance Reform Act. His attempt to disarm the appellant's companion, Eugene Bailey, did not give rise to a deprivation of a right clearly established by statutory law or constitutional rights. Moreover, like the law enforcement officer in *Goines v. James, supra,* Officer Dunn was engaged in the performance of discretionary judgments and actions within the course of his authorized law enforcement duties. In performing those discretionary duties, Officer Dunn should not be faced with the choice of either inaction and dereliction of duty or "being mulcted in damages" for doing his duty.

We adopt the principle noted in *City of Fairmont v. Hawkins,* 172 W.Va. 240, 304 S.E.2d 824, 829 n. 7 (1983), with respect to the performance of such discretionary duties:

[I]f a public officer . . . is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, *he is not liable for negligence or*

other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Quoting Gildea v. Ellershaw, 363 Mass. 800, 814, 298 N.E.2d 847, 858-59 (1973) (emphasis added); *see also, Graney v. Board of Regents,* 92 Wis.2d 745, 286 N.W.2d 138 (1979); *Mobile Enterprises, Inc. v. Conrad,* 177 Ind.App. 475, 380 N.E.2d 100 (1978).

Therefore the doctrine of qualified or official immunity bars a claim of mere negligence against the Department of Public Safety, a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va.Code § 29-12A-1, *et seq.,* and against an officer of that department acting within the scope of his employment, with respect to the discretionary judgments, decisions, and actions.

C. NO CUSTOM OR POLICY OF THE WEST VIRIGNIA DEPARTMENT OF PUBLIC SAFETY CAUSED THE DEPRIVATION OF THE APPELLANTS' CONSTITUTIONAL RIGHTS

Even if the State could be considered a person for § 1983 purposes, it is well settled that a municipality is only liable under §1983 if a plaintiff suffers a deprivation of his federal rights because of an official policy or custom. *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999). A governing body, like a state agency, cannot be held liable under 42 U.S.C. § 1983 unless a custom or policy of the entity causes the deprivation of a person's constitutional rights. *Monell v. New York City Dept. of Social_Services*, 436 U.S. 658, 694-695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991) (a county's §1983 liability is a derivative of, but narrower than, an officer's). Thus, the Appellants cannot prevail against the WVDPS unless they can demonstrate both a constitutional violation and an agency custom or policy that caused the violation. *Kopf v. Skyrm*, 993 F.2d 374, 381 (4th Cir. 1993). The Appellants can satisfy neither of

these requirements. See *Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994) (the substantive requirements for proof of municipal liability are stringent).

The Fourth Circuit has held that plaintiffs seeking to impose liability on a municipality must, therefore, adequately plead and prove the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights. *Semple v. City of Moundsville*, 195 F.3d 708, 712 (4th Cir. 1999) *citing Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994). Thus, a prerequisite to municipal liability is finding that an official policy or custom existed. A plaintiff cannot rely on scattershot accusations of unrelated constitutional violations to prove either that a municipality was indifferent to the risk of her specific injury or that it was the moving force behind her deprivation.....Thus, "municipal liability will attach only for those policies or customs having a specific deficiency or deficiencies such as to make the specific violation almost bound to happen, sooner or later, rather than merely likely to happen in the long run". *NeisWonger v. B.K. Hennessey,* 89 F. Supp.2d 766, 776 (N.D.W.V 2000). (Citing *Spell v. McDaniel,* 824, F.2d 1380, 1390, (4th Cir. 1987) See also *Carter v. Morris* ("Permitting plaintiffs to splatter-paint a picture of scattered violations also squanders scarce judicial and municipal time and resources").

Appellants argue that the WVDPS should be liable based on their assertion that the Department exercised deliberate indifference in allowing a policy or custom of excessive force to continue within the Department. To support this theory, the Appellants only offer a self serving opinion that the "conduct of the State, immediately giving Trooper Kane a gun and putting him on the street without even a short administrative suspension pending investigation, and the failure to take any disciplinary

action against him shows, at worst, that the State and its supervisors ratified Trooper Kane's misconduct, and at best, that the State has an ongoing custom and practice of allowing and tolerating excessive force amongst its troopers." See Appellants Brief at p. 20.

Appellants cite *Bordanaro v. McLeod*, 871 F.2d 1151, 1159-63 (1st Cir.), cert. denied 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989) and *Grandstaff v. City of Borger,* 767 F.2d 161, 169-72 (5th Cir.1985) to support their argument. These out of jurisdiction cases can be distinguished in that they involved obviously unconstitutional misconduct which involved multiple officers that was unreasonably ignored by the policymaker of the respective Department. No such inference can be reasonably drawn from the facts at hand. The cases cited by the Appellants also held that "A plaintiff can properly rely on the single incident ***only*** if there is other evidence of inadequate training." See *Vineyard v. County of Murray*, 990 F.2d 1207, 1212-14 (11th Cir.), cert. denied 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993); Russo, 953 F.2d at 1041, 1046-48; *Bordanaro v. McLeod*, 871 F.2d 1151, 1159-63 (1st Cir.), cert. denied 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989); *Grandstaff v. City of Borger*, 767 F.2d 161, 169-72 (5th Cir.1985); *Diaz v. Salazar*, 924 F.Supp. 1088, 1098-99 (D.N.M.1996). Emphasis added. Finally, the Fourth Circuit has held, pursuant the United States Supreme Court opinion in *City of Oklahoma City v. Tuttle,* 471 US. 808, 823-24 (1985), that proof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom. *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).

There is no evidence or finding other than the speculation by the Appellants that it was improper for the WVDPS to put Trooper Kane back to work and not discipline him.

The State Police initiated a criminal investigation immediately following the shooting. Exhibit 2 of Kane Deposition. The shooting was reviewed by the State Police Shooting Review Board. (J.R. Pauley Deposition pgs 37-40) and the case was presented to a grand jury. None of these reviews found that Trooper Kane had discharged his weapon improperly or illegally. Second, the Appellants assertion that "the State has an ongoing custom and practice of allowing and tolerating excessive force amongst its Troopers" is equally speculative and the Appellants have produced absolutely no evidence of any custom or practice by the WVSP which lead to a violation of the plaintiffs or decedent constitutional rights.

Even more outrageous is the Appellants' assertions regarding the county prosecutor. In their brief, they make defamatory and libelous statements, without any evidence whatsoever, that the prosecutor "covered up" the conduct of Trooper Kane. Appellants go as far as to state the actions of county prosecutor demonstrate an ongoing pattern and practice of the State and claim that the "State is liable under the § 1983 claims for the shooting and killing of Charles Pruitt by defendant Kane, as well as for the subsequent cover-up by defendant Kane and the State Prosecutor." The Appellants make these outrageous claims but did not find it necessary to include the prosecutor as a defendant in the case nor plead the allegation of a cover-up in their complaint. To the knowledge of the Appellee, there has never been a formal complaint of any type made against the prosecutor to the West Virginia State Bar or any other agency concerning this alleged misconduct. The Appellants obviously realized that they do not have any credible evidence to support their allegations against this Appellee and therefore are

making ridiculous and defamatory claims against a member of the bar without any legal or factual support.

The Appellants have failed to provide any specific deficiency in a custom or policy that would make the events of this case bound to happen.

D. THE APPELLANTS HAVE FAILED TO PRODUCE SUFFICIENT EVIDENCE TO PROVE THE APPELLEE WVDPS FAILED TO ADEQUATELY TRAIN TROOPER KANE

Before the trooper's interaction with the plaintiff on April 6, 2002, the West Virginia State Police adopted policies, procedures, rules, and regulations. (Hereinafter "State Police policies"). The State Police policies prohibit the violation of a citizen's constitutional rights by its employees. *See* 81 CSR10 et seq. The State Police policies outline a stringent hiring and training regimen. As the following demonstrates, no custom or policy of the West Virginia State Police resulted in the Plaintiff being deprived of his constitutional rights.

In *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed 2d 412 (1989), the United States Supreme Court was presented with the question of whether a city can be held liable under 42 U.S.C. § 1983 for the alleged violation of a pretrial detainee's Fourteenth Amendment rights. First, the *Canton* Court recognized the longstanding principle that respondent superior or vicarious liability will not attach under § 1983. *Id.* at 385; See also, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Next, the Court stated that "there are limited circumstances in which an allegation for a 'failure to train' can be the basis for liability under § 1983." *Canton*, 489 U.S. at 387. Finally, it was held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train

amounts to deliberate indifference to the rights with whom the police come into contact." *Id* at 388. The need for more or different training must be so obvious and the inadequacy so likely to result in the violation of constitutional rights that the policy makers can reasonably be said to have been deliberately indifferent to the need. *Id* at 390.

The Fourth Circuit, in analyzing this issue held:

> Although plaintiffs allege that the Moundsville Police Department's practice was to train officers improperly in the implementation of the official domestic violence policy, they do not point to any specific deficiency in police training. When taking all the evidence in the light most favorable to the plaintiffs, the most they could prove is that there may have been a general ineffectiveness in training. The plaintiffs present no evidence of a specific deficiency, and therefore their § 1983 claim fails in this respect.

Semple v. The City of Moundsville, 195 F.3d 708 (4th Cir. 1999)

> A city's policy of inadequately training its police force can serve as a basis for § 1983 liability if the city's failure to train "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). In this context, deliberate indifference will be found where the municipality fails to provide adequate training notwithstanding an obvious likelihood that inadequate training will result in the violation of constitutional rights. Id. at 390. The plaintiff must also prove that "the deficiency in training actually caused the police officers' indifference" to the public's constitutional rights. Id. at 391. A generalized showing of a deficient training program is not sufficient. The plaintiff must establish that the particular officers who committed the violation had been deprived of adequate training, and that this specific failure in training was at least a partial cause of the ultimate injury. See *Young v. City of Providence*, 404 F.3d 4, 26 (1st Cir. 2005).

It is worth noting that the West Virginia Supreme Court recognized the difficulties that individuals, like the plaintiff, have in attaching § 1983 liability to governmental entities.

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees.

Board of Cty. Com'rs of Bryan County v. Brown, 117 S. Ct. 1382, 1389, 137 L.Ed.2d 626 (1997).

In this case, it is uncontroverted that the West Virginia Troopers involved in this incident were well trained and experienced. All Troopers initially completed a written application with the State Police, answered a written test, provided an oral interview, participated in an extensive background investigation, and passed a medical evaluation as required by law.[10] Trooper Kane was assigned to a training officer after he attended and graduated from the West Virginia State Police Academy. He was provided with a copy of State Police policies and received training specific to those policies. Troopers are required to attend at least sixteen (16) hours of annual in-service training approved by the Governor's Committee on Crime, Delinquency, and Correction-Law Enforcement Training Sub-Committee, in order to retain their state certification as law enforcement officers. *See* 149 CSR 2.10 et seq. The State Police require that all officers attend annual in-service training approved by the Governor's Committee.

Appellants' application of the law to this case and their continued reliance on a very brief, two question exchange from Trooper Kane's testimony about his training is very misleading and disingenuous. Unexplainably, the Appellants continue to ignore and overlook the overwhelming, indisputable evidence to the contrary which was pointed out to the Petitioner during the summary judgment hearing and in all of the previous filings

[10] The hiring regiment for all troopers is outlined in 81CSR2 of the West Virginia Code of State Rules. The Rules have the force and effect of law in West Virginia.

of the Appellees. Trooper Kane testified extensively about his training during his deposition. This included testimony regarding when to stop shooting. (Kane Deposition pgs 124-129, 137-138, 176-180, 183-184). Yet, once again the Appellants fail to acknowledge that testimony and instead continue to stand by the misleading assertion that Trooper Kane was not provided training on when to stop firing his weapon.

In their brief, Appellants cite the report of their expert Lou Reiter as summing up the applicable law as follows:

> 27. Reasonable police officers[s] are trained to acquire "target acquisition" when they resort to the use of deadly force. That means that each shot is a decision point and the officer is trained to evaluate the necessity for the use of deadly force each time he/she pulls the trigger. ***In the past several years the generally accepted police training is to continue to fire the weapon until the immediate threat stops. Once the immediate threat stops, officers are trained to cease firing at the subject.***

(Appellants' Brief pg. 29 emphasis added)

Interestingly, Trooper Kane, prior to the report and deposition of the Appellants' expert, described the training he received from the West Virginia State Police academy in response to the following questions from Appellants counsel:

Q. Trooper Kane, yesterday I asked you a question to the effect of what training you had about when you're supposed to quit firing a gun in a situation where you're shooting a person. And just going to ask you if you recall what training you've had in that regard.

A. Yes, sir. After thinking about that question, I was taught that if you have to fire your weapon, fire it until the threat is gone. And, you know, that's exactly what I did that day.
Q. Now, where did you receive that training?
A. It's training through the state police.

9 Q. Okay. Would have this been in the State
10 Police Academy or would it have been in a
11 refresher course or --
12 A. It started at the State Police Academy.

(Kane Deposition pgs 124-125)

Not only does Kane describe his training during this and other exchanges throughout the deposition, his statement of how he was trained is consistent with that of the Appellants' own expert witness. The undisputed evidence also shows that Trooper Kane did not empty the second clip, but ceased firing when he determined the threat was gone which is consistent with the training described by both Trooper Kane and Mr. Reiter.

Finally, Petitioner Vanessa Pruitt, in response to questions from counsel gave her following testimony concerning the training of Trooper Kane.

Q In the complaint, you make specific allegations against the West Virginia State Police, and I want to ask you just briefly about those. One of the allegations that you make in the complaint was that the West Virginia State Police failed to properly supervise Trooper Kane. Do you know what you mean by that allegation?
A I don't know where that come from.

Q I take it you don't know any facts that lead up to that allegation that we –
A. No, I sure don't.

Q -- improperly trained –
A No.

Q -- or improperly supervised Trooper Kane?
A I'd said that if he was a professional – and if I was a professional, I don't think I'd have to shoot a person that many times – if he was a professional, if that was his profession. I mean, I just don't think that you would have to shoot somebody – you wouldn't shoot an animal that many times, and I sure wouldn't shoot a person.

Q One of the other allegations in the complaint was that we –
A I did say that. So if that's the way they wanted to put it about the professional, that might have been what they meant about the professional.

Q That you believe that Trooper Kane shot Mr. Pruitt too many times?

A I don't believe that he was professional – he was not professional about it, no, he was not.

Q Specifically in regard to the allegation that the West Virginia State Police failed to properly train Trooper Kane –

A I didn't – I don't know nothing about the – I did not say nothing about the – I did not say nothing like that.

Q In your mind, at least from what you've read and from what you know, do you have any specific allegations that support the fact that we failed to properly train Trooper Kane?

A No. I have not said nothing about that, no

Q What about the fact that we are alleged to have improperly instructed and controlled Trooper Kane, do you have any facts that support those allegations?

A Say that again, ma'am.

Q That the West Virginia State Police failed to properly instruct and control Trooper Kane?

A I would say that the State Police had nothing to do with Trooper Kane that night.

This deposition occurred early in the discovery process, the Appellants never tried to rehabilitate it through any other witness or expert. Instead they rely entirely on the short two sentence exchange described earlier in the section which is clearly insufficient to survive the Motion for Summary Judgment.

E. THE CIRCUIT COURT'S ORDER CONTAINED SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW TO ALLOW MEANINGFUL REVIEW BY THIS COURT.

Appellants argue that the Order did not provide sufficient findings of fact and conclusions of law to allow meaningful review. The Appellants contend that they submitted twenty (20) pages of controverted material facts however the vast overwhelming majority of those facts dealt only with the allegations against Appellee

Kane and not the WVDPS . Of the 20 pages[11], only the following statements were submitted to support their claim regarding the actions against the Department.

> **Plaintiffs' Fact No. 15.** Defendant Kane was reissued a service revolver by the State Police on the same day he shot and killed Charlie Pruitt, and was immediately placed back on the Street with the gun as a State Trooper without administrative suspension. (See West Virginia State Police Report of Criminal Investigation p. 7 Exhibit 38).
>
> **Plaintiffs' Fact No. 16.** No disciplinary action of any kind was taken by the State against Timothy Pruitt[12] for the Shooting and Killing of Charlie Priutt. (See Pauley deposition p 39, Exhibit 39).
>
> **Plaintiffs' Fact No. 17.** Trooper Kane never received any training as to when he should quit firing a gun in a situation where he is shooting at someone. (See Kane Depo., p 91, Ins. 17-21, Exhibit 40.

These facts have previously been discussed and are basically self serving statements without any evidence to show that the Department actions were improper.

In fact the previous arguments, along with a review of the pleadings, clearly demonstrate that the Department acted correctly in this case. Therefore create a genuine issue of a material fact. The circuit court acknowledges this in the Order when it stated that "the plaintiffs have failed to identify an official policy or custom of the West Virginia Department of Public Safety that caused a deprivation of plaintiffs' or plaintiffs' decedent's constitutional rights, nor has there been evidence offered which creates a genuine issue of material fact that the West Virginia Department of Public Safety was deliberately indifferent to any rights of the plaintiffs or of plaintiffs' decedent, given the

[11] The submission actually contained the alleged controverted facts on the first 15 1/2 pages, none of which involved the claims against the Department. Appellants' then submitted additional facts on pages 16-19. The bottom of page 19 contained the only alleged facts concerning the Department. Page 20 was only a signature page.

[12] It is assumed that the Appellants meant Trooper Kane and not Timothy Priutt.

elements outlined in Shaw v. Stroud.[13] Further, given the totality of the deposition testimony, the plaintiffs have failed to establish a genuine issue of material fact such that a reasonable jury could find in her favor." The Appellants presented no legitimate facts, therefore extensive findings of facts were not only unnecessary, but not possible.

As to the sufficiency of the conclusions of law, the circuit court was not, nor should this Court be, persuaded by the completely meritless and baseless arguments of the Appellants in this matter. It is a shame that so much time has to be spent defending arguments that have no reasonable legal basis considering the on point case law to the contrary. The circuit adequately discussed the Appellants' argument when it stated "the Court finds the argument that it is actually the Department's insurer that is the real party, to be unpersuasive" and that "[a]ccepting that argument would essentially obliterate the definition of the term "person" as used in the statute for most cases." Although the circuit court did not specifically mention the case of *Pittsburgh Elevator*, the Court clearly gave a legitimate reason why that argument could not apply to a § 1983 action.

Finally, if this Court were to find that the circuit court failed to provide sufficient findings of fact and conclusions of law to allow meaningful review, the only remedy would be to remand this case back to the circuit court to provide this Court with a more specific findings of facts and conclusions of law. Considering the sparse facts and meritless arguments presented by the Appellants, that option would seem to be unnecessary and a waste of judicial economy.

[13] *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).

F. APPELLEES WVDPS AND KANE (IN HIS OFFICIAL CAPACITY) ARE NOT PRECLUDED BY THE DOCTRINES OF JUDICIAL AND EQUITABLE ESTOPPEL FROM ASSERTING IMMUNITY OR OTHER DEFENSES TO AVOID TRIAL ON THE MERITS

The Appellants assert that the Appellee should be judicially and equitably estopped from asserting immunity or other avoidance defenses in this matter based upon representations made by the prosecuting attorney of McDowell County while appearing before a grand jury investigating the death of Charlie Pruitt. While the Appellees do not disagree with the general statements of law concerning judicial and equitable estoppel, the Appellants application of these legal theories to this matter are completely without legal merit.

The Appellants' reliance on the theory of judicial estoppel must fail for multiple reasons. As provided by the Appellants, judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. *Dept of Transportation v. Robertson*, 217 W.Va. 497, 618 S.E. 2d 506, 513-14 (2005).

The Appellants can not meet any of the four steps provided by the *Robertson* Court. The following analysis of the factors in the same order as addressed by the Appellants clearly demonstrates their misapplication of the law.

(1) **Inconsistent positions.** - In their analysis of this factor the Appellants state that:

> The State represented in the proceedings before the grand jury lawsuit that the plaintiff, Vanessa Pruitt could get "thirty million dollars ($30,000,000.00)" in a "full-blown jury trial ... bring[ing] out all the evidence" in the civil lawsuit (Grand Jury Transcript, p 117, Ins 1-2, 6-7.) Then, in the lower court, in the instant lawsuit, the State successfully represented to the circuit court that plaintiffs are barred from getting any monetary relief at all.

(Appellants' Brief pg. 24)

The excerpt provided by the Appellants from the grand jury proceedings can hardly be taken as a clearly inconsistent position in this matter. Notwithstanding the fact that the parties and proceedings are different (see discussion below), there is no evidence that Trooper Kane or the West Virginia State Police ever put forth an inconsistent position in this matter. It has been and continues to be the unwavering position of the defendants that Trooper Kane was justified in shooting Mr. Pruitt. It is undisputable that the grand jury proceeding was a criminal proceeding and not a civil proceeding. The comments by the prosecuting attorney were not a legal theory and even if they were considered a legal theory, all the prosecutor was doing was explaining that the Pruitt's had filed a civil suit and could maintain that action even if the grand jury chose not to return a true bill. It is well settled that an acquittal, or in this case a failure of a grand jury to indict, on criminal charges does not bar a subsequent civil suit based on the same conduct. *Helvering v. Mitchell*, 303 US 391, 397 (1938). The grand jury did not return a true bill because they believed that Trooper Kane did not commit a criminal offense. There is absolutely no evidence, only the Appellants' self-serving statements that the grand jury failed to indict based on the prosecutors comments regarding the civil suit.

Even if the grand jury had been swayed by these comments, it still would have no legal effect on these proceedings which could even remotely lead to judicial estoppel. The defenses raised by the Appellee in this matter are exclusive to civil proceedings and are not applicable to criminal proceedings. It is legally impossible for these defenses to be inconsistent with the prosecutor's statements since they can not even be raised in a criminal proceeding.

(2) **Same parties** – The Appellants claim that they were parties to the criminal proceeding is totally without merit or legal support. First, the West Virginia Department of Public Safety was not a named party in the grand jury and Trooper Kane was a named defendant for the purpose of completing a grand jury investigation into the shooting of Charlie Pruitt. Although the Appellants were interested persons, they are clearly not parties to the criminal proceeding. The Appellants' refer to the Appellees and the County prosecutor collectively as "the State" throughout this section of their argument and even request leave of this Court to file an amended complaint against the "State" alleging that the "State" retaliated against the Appellants by denying them relief in the criminal case in violation of their constitutional rights. See Appellants' Brief, page 35, footnote 13. It is common knowledge that the prosecutor is employed by McDowell County and represents the State of West Virginia and its citizens. Although a prosecutor has a duty to vindicate victims of legitimate crimes, his actions cannot be construed as representation of those victims. In this case the action of the county prosecutor cannot be construed as representations of either the defendants or Appellants. Since the parties are not the same, judicial estoppel cannot apply.

(3) **Benefit received** – The Appellants claim that the Appellees received a benefit since Trooper Kane was not indicted and convicted in the criminal court proceedings. It is the position of the Appellee that justice was served in that the grand jury cleared Trooper Kane of any wrongdoing based upon the evidence that was presented to them. As stated previously, the grand jury proceeding can not be considered a previous case for the purpose of judicial estoppel. The Appellants would have been pleased if Trooper Kane was convicted of a crime so they would not have to prove liability. Their claim that Trooper Kane and the WVSP received an unfair benefit as the result of an inconsistent position in a previous case is totally without legal or factual support.

(4) **The new position injures plaintiffs** – As stated previously, The Appellees have maintained that the shooting of Charlie Pruitt was justified throughout these proceedings and that position is consistent with the investigation by the WVSP. The Appellees have never put forth an inconsistent statement. The mere fact that the county prosecutor, who is not a party to this lawsuit, commented on the existence of this lawsuit during the grand jury proceeding has nothing at all to do with whether or not the Appellees can raise legal defenses such as qualified immunity. The Appellees to the instant action had nothing to do with the comments made by the prosecutor. In addition, there is no evidence that the comments made by the prosecutor injured the Appellants cause of action. There is absolutely no evidence that the Appellants detrimentally relied on a position taken by the Appellees or that any action by the Appellee injured the Appellants. Even if the prosecutors comments were later determined to be improper, which the Appellees are not alleging or conceding, the remedy would not be a bar to legally permissible affirmative defenses in the civil suit.

The Appellants analysis of the law of equitable distribution is equally without merit. The West Virginia Supreme Court has held that:

> The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." Syl. pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956).

The Appellants claim that "the State's earlier representation to the grand jury that the plaintiff's could get up to 30 million dollars in damages from the State was false or a concealment if the State could assert avoidance defenses in the civil lawsuit to avoid any monetary damages or liability at all" makes absolutely no sense. First there was no concealment of material facts and there is no evidence that the Appellants or the Court relied upon or acted upon any representation to their prejudice. Whether the county prosecutor acted properly or instructed the grand jury properly does not impact the Appellees legal right to assert defenses in the current lawsuit. The county prosecutor's actions in the criminal proceedings cannot be construed to bind the Appellees for the same reasons as stated by the Appellees in their argument regarding judicial estoppel.

V. CONCLUSION

Based upon the above, the Appellee, West Virginia Department of Public Safety, respectfully requests that the Order of the circuit court be affirmed and this appeal be denied.

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY

By Counsel,

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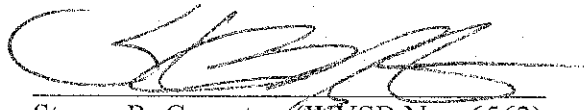
Attorney General of West Virginia

By:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VANESSA JEAN PRUITT, ADMINISTRATRIX OF THE ESTATE OF CHARLIE E. PRUITT, DECEASED; VANESSA JEAN PRUITT, MOTHER AND LEGAL GUARDIAN OF ANGEL M. PRUITT, AN INFANT UNDER THE AGE OF 18 YEARS; VANESSA JEAN PRUITT, INDIVIDUALLY; AND TIMOTHY B. PRUITT,

Appellants,

v. **No. 33526**

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY, C.F. KANE, JOHN DOE I, JOHN DOE II, and JOHN DOE III,

Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel for the defendant, West Virginia Department of Public Safety, does hereby certify that the foregoing **"BRIEF OF APPELLEE DEPARTMENT OF PUBLIC SAFETY"** was served upon the following counsel of record by depositing a true copy in the United States Mail, postage prepaid, this the 18th day of January, 2008, as follows:

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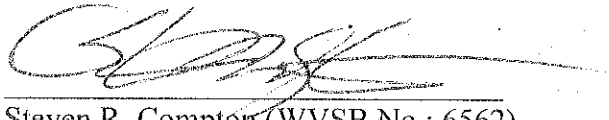

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